

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court Cause No. 10-0306

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CHERYL CALVERT,	)
	)
Appellant,	)
	)
vs.	)
	)
CAROLYN GEIGER, individually	)
and as Personal Representative of the	)
ESTATE OF EUNICE JEANETTE	)
“JEAN” SKELTON,	)
	)
Appellee.	)

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**BRIEF OF APPELLANT**

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On Appeal From The Montana Fourteenth Judicial District Court, Musselshell County

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## APPEARANCES:

Kirk D. Evenson  
Marra, Sexe, Evenson & Bell, P.C.  
P.O. Box 1525  
Great Falls, MT 59403-1525

(Attorneys for Appellant)

Court E. Ball  
Towe, Ball, Enright, Mackey  
& Sommerfeld, P.L.L.P.  
P.O. Box 30457  
Billings, MT 59107-0457

(Attorney for Appellee)

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## **I. STATEMENT OF APPEAL ISSUES PRESENTED FOR REVIEW**

1. Whether the district court erred by imposing a distinction for the distribution of assets of the estate upon the intent of the testatrix when none exists within the Will.

2. Whether the district court's finding of fact with regard to the definition of "share" within the Will is clearly erroneous.

3. Whether the district court erred by holding that Cheryl Calvert is not entitled to a life estate despite finding that she is entitled to an exclusive right to reside on the property for the rest of her life.

## **II. STATEMENT OF THE CASE**

In March of 2005, Cheryl Lynn Calvert filed a *Complaint* against her sister, Carolyn DeAnn Ratcliff Geiger, personally and as Personal Representative of the Estate of Eunice Jeannette "Jean" Skelton, alleging negligent misrepresentation, fraud, and a breach of fiduciary duty in the probate of her mother's estate caused her damage. See Appendix Exhibit (hereafter "App. Ex.") A, *Complaint*, p. 5-7. The *Complaint* also named James Murphy and Lottie Blades as individuals, as well as their companies, Murphy, Kirkpatrick & Fain, LLP and Legal Tech, Inc., respectively,

alleging professional negligence in the probate of Eunice Jeannette “Jean” Skelton resulting in damage to Cheryl Calvert. App. Ex. A, p. 7-8.

All of the named Defendants filed *Motions to Dismiss* pursuant to Mont.R.Civ.P. 12(b)(6). The District Court denied Ms. Geiger’s motion to dismiss, but granted the motions on behalf of the all the other defendants, ordering a change of the heading to accurately depict the parties. See App. Ex. B, *Order Changing Heading, Order on Carolyn Geiger’s Motion to Dismiss, Order on Defendants’ Murphy & Murphy, Kirkpatrick & Fain’s Motion to Dismiss, and Order Setting Scheduling Conference*; App. Ex. C, *Order Changing Heading and Order on Defendants’ Lottie Blades and Legal Tech, Inc.’s Motion to Dismiss*. Cheryl Calvert filed a *Notice of Appeal* for both orders issued by the District Court dismissing Defendants James Murphy, Murphy, Kirkpatrick, & Fain, Lottie Blades, and Legal Tech, Inc. See App. Ex. D, *Notice of Appeal*; App. Ex. E, *Notice of Appeal*. Upon request from Cheryl Calvert, the Supreme Court of Montana dismissed both appeals without prejudice on November 2, 2005.

A bench trial was held on September 17, 2007. On December 20, 2007, the District Court issued *Findings of Fact, Analysis and Order*. App. Ex. F. In its written *Order*, the District Court adopted as fact that the

decedent's intent was for the assets of the estate to be distributed equally between Ms. Geiger and Ms. Calvert and that Ms. Calvert was to be able to live on the real property located in Montana for as long as she wanted rent free. App. Ex. F, p. 1. The trial court held that the estate was closed but that the Personal Representative had not administered the estate pursuant to the Will and decedent's intent and therefore ordered that the "estate be reopened for the sole purpose to effectuating that will and its intent." App. Ex. F, p. 4. The District Court further ordered that "the estate conduct an ancillary probate and sale of the real property located in California, the proceeds of the sale, after expenses, to be divided equally between Ms. Geiger and Ms. Calvert." *Id.*

On May 12, 2008, Cheryl Calvert filed her *Motion for Enforcement of Order* requesting the District Court to require Ms. Geiger to take action and comply with the instructions outlined in the Court's *Findings of Fact, Analysis and Order*. App. Ex. G, *Motion for Enforcement of Order*. On August 18, 2008, a hearing on the *Motion for Enforcement of Order* was held. The District Court issued its *Order on Motion for Enforcement* on September 19, 2008. App. Ex. H. In this written *Order*, the District Court clarified its previous rulings, holding that the equal distribution of the

estate's assets did not include the real property located in Montana, instead, Cheryl Calvert was only entitled to the "right to live on the property exclusively." App. Ex. H, p. 3.

Cheryl Calvert, as Appellant, now appeals the decisions of the District Court that define her "share" of the her mother's estate as anything but an equal division of all assets of the estate, including the real property located in Montana. In the alternative, if this Court finds that Cheryl Calvert is not entitled to an equal distribution of the real property in Montana, she requests that this Court find that the testatrix's intent was to provide her with a life estate in the property.

### **III. STATEMENT OF FACTS**

1. Appellant, Cheryl Lynn Calvert (hereinafter "Cheryl"), is a resident of Cascade, Cascade County, Montana. App. Ex. A, *Complaint*, p. 1.

2. Appellee, Carolyn DeAnn Ratcliff Geiger (hereinafter "Carolyn Geiger") is a resident of Corona, California. *Trial Transcript*, p. 202, l. 3-4.

3. Cheryl and Carolyn Geiger are both daughters of Eunice Jeannette "Jean" Skelton (hereinafter "Ms. Skelton"). App. Ex. I, *Last Will and Testament of Eunice Jeannette Skelton*, p. 1.

4. Ms. Skelton also had a son, David Fuentes. App. Ex. I, *Last Will and Testament of Eunice Jeannette Skelton*, p. 1.

5. Ms. Skelton was married to Darrell Skelton, who had three children from a previous marriage, Dennis Harper Skelton, Cheryl Elizabeth Work and Darwin Hunter Skelton. Darrell Skelton predeceased Ms. Skelton. App. Ex. I, *Last Will and Testament of Eunice Jeannette Skelton*, p. 1.

6. The real property, which is partially the subject of the dispute is located in Musselshell County, Montana, (hereinafter referred to as the “Montana Property”) and more particularly described as follows:

Township 7 North, Range 24 East, M.P.M  
Section 29: Lot 7

of Certificate of Survey #1978-15, according to the official plat thereof on file and of record in the office of the Clerk and Recorder of said county and state. App. Ex. A, *Complaint*, p. 3.

7. On June 19, 1998, Cheryl was involved in a serious motor vehicle accident and as a result, lost one of her legs to amputation as well as suffered from a closed head brain injury. *Trial Transcript*, p. 42-43.

8. In June 1998, Ms. Skelton contacted Corbit Harrington of Harrington & Spaulding, P.C. for estate planning. *Trial Transcript*, p. 108, l. 9-20.

9. As part of the estate planning for Ms. Skelton, Corbit Harrington drafted a Last Will and Testament, a Living Will Declaration, a Durable Power of Attorney for Health Care, a Durable Power of Attorney (for business and financial decisions) and a Quit Claim Deed to her real property in Musselshell County delivering the real property to Cheryl and Carolyn Geiger, as tenants in common. *Trial Transcript*, p. 110, l. 3-23.

10. The Last Will and Testament of Eunice Jeannette Skelton, admitted for probate includes the following language:

V.

I give, devise and bequeath all the rest, residue, and remainder of my property, of all kinds, real and personal, not otherwise disposed of in this will and all lapsed and void devises and bequests, if any, and all property which for any reason my not otherwise pass under the provisions of this will, to my daughter, Carolyn DeAnn Ratcliff Geiger, to disburse between Carolyn DeAnn Ratcliff Geiger and Cheryl Lynn Calvert as I have instructed Carolyn DeAnn Ratcliff Geiger to do. If Carolyn DeAnn Ratcliff Geiger predeceases me, then her share shall go to her children, namely Kyle Scott Gibson and Clinton Gibson.

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If Cheryl Lynn Calvert predeceases me, then her share shall to [sic] my daughter, Carolyn DeAnn Ratcliff Geiger.

App. Ex. I, *Last Will and Testament of Eunice Jeannette Skelton*, p. 2.

11. The *Last Will and Testament of Eunice Jeannette Skelton* expressly excluded David Michael Fuentes, Dennis Harper Skelton, Sherill Elizabeth Work, and Darwin Hunter Skelton. App. Ex. I, *Last Will and Testament of Eunice Jeannette Skelton*, p. 1.

12. The Durable Power of Attorney for Health Care was drafted so that Cheryl and Carolyn Geiger could make health care decisions on behalf of Ms. Skelton. Trial Exhibit (hereinafter “Tr. Ex.”) 64, *Durable Power of Attorney for Health Care*.

13. The Durable Power of Attorney was drafted for Carolyn Geiger to make business and financial decisions for Ms. Skelton, as necessary. Tr. Ex. 78, *Durable Power of Attorney*.

14. The Quit Claim Deed to real property in Musselshell County was drafted with the intent to transfer the real property to Ms. Skelton’s two daughters, Cheryl and Carolyn Geiger, as tenants in common. *Trial Transcript*, p. 110, l. 25 - p. 111, l. 20.

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15. At the same time as delivering the estate planning documents, Corbit Harrington cautioned Ms. Skelton with his letter of June 26, 1998 with the following paragraph:

Before signing these documents, I want to remind you of my concerns about one of your daughter's (I believe it was Cheryl Lynn's) husband. If the divorce has been completed, then my concerns are eased. But, if the divorce has not been completed, the property you gift to her becomes part of the marital estate for divorce purposes.

Tr. Ex. 75, June 26, 1998 Letter from Corbit Harrington to Ms. Skelton.

16. At the time the Last Will and Testament and Corbit Harrington's letter of June 26, 1998 were drafted, Cheryl was still married to her husband, Jim Wahrer. *Trial Transcript*, p. 29, l. 15-25.

17. Cheryl's *Dissolution of Marriage* was entered on January 28, 1999. *Trial Transcript*, p. 29, l. 15-25.

18. Ms. Skelton signed the Will drafted for her by Corbit Harrington on October 17, 1998. At the time she signed her Will, the quit claim deed originally proposed by Corbit Harrington transferring the Montana Property to Cheryl and Carolyn Geiger as tenants in common was not signed. Instead a deed delivering the Montana Property to Carolyn Geiger, individually, was signed by Ms. Skelton. App. Ex. I, *Last Will and*

*Testament of Eunice Jeannette Skelton; Trial Transcript*, p. 110, l. 19, p. 111, l. 20.

19. On June 28, 1999, Carolyn Geiger returned the Montana Property to Ms. Skelton by Quit Claim Deed that was recorded in the records of Musselshell County in Book 368, Page 362. Tr. Ex. 76, *Quit Claim Deed*.

20. Cheryl moved to the Montana Property on April 1, 2000 in order to take care of her mother. *Trial Transcript*, p. 50, l. 1-4.

21. Ms. Skelton died on November 22, 2000. App. Ex. A, *Complaint*.

22. On March 14, 2001, Carolyn Geiger was appointed the Personal Representative of the Estate of Eunice Jeannette Skelton, duly qualified, and was issued Letters of Administration of the Estate by the Court in Cause No. DP-01-04. Tr. Ex. 56, *Letters of Administration*.

23. During the probate administration of the Estate of Eunice Jeannette Skelton, Carolyn Geiger, as the personal representative of the estate, distributed one-half of the cash assets of the decedent to herself and one-half to her sister Cheryl. Included in those cash assets was an inheritance from Ms. Skelton's aunt, Nettie Eunice Walker, which had

accrued but had not been delivered to Ms. Skelton before her death. The \$20,000 distribution from the Estate of Nettie Eunice Walker was disbursed by Carolyn Geiger consistent with the other cash assets, one-half to herself and one-half to her sister Cheryl. App. Ex. F, *Findings of Fact, Analysis, and Order*, Finding No. 4.

24. The Estate of Eunice Jeannette Skelton included real property located in California. App. Ex. F, *Findings of Fact, Analysis, and Order*, Finding No. 5.

25. The Estate of Eunice Jeannette Skelton included real property located in Montana, as further described above.

26. On or about March 18, 2002, Carolyn Geiger signed a *Deed of Distribution* which was subsequently recorded on July 25, 2002, which transferred the real property from the estate to herself, Carolyn Geiger, to the exclusion of Cheryl. App. Ex. A, *Complaint*, Ex. B - *Deed of Distribution*.

27. Also on or about March 18, 2002, Carolyn Geiger signed a Montana Department of Revenue Form INH-1, *Inventory and Appraisement* of the Estate of Eunice Jeannette Skelton, and a Department of Revenue Form INH-2, *Application for Determination of Inheritance Tax*. The *Application for Determination of Inheritance Tax* states on page 3 that

Carolyn Geiger was to receive all of the assets belonging to the decedent, Eunice Jeannette Skelton, at the time of her death. App. Ex. A, *Complaint*, Exhibits C & D - *Montana Department of Revenue Form INH-1, Montana Department of Revenue Form INH-2*.

28. On or about March 18, 2002, Carolyn Geiger also signed a *Personal Representative's Sworn Statement to Close Estate* to be filed in the Estate of Eunice Jeannette Skelton. App. Ex. A, *Complaint*, Exhibit E, *Personal Representative's Sworn Statement*.

#### **IV. STANDARD OF REVIEW**

“The judicial interpretation and construction of a will is a question of law.” *In re Estate of Snyder*, 2000 MT 113, ¶8, 299 Mont. 421, 2 P.3d 238 (citing *Estate of Bolinger* 284 Mont. 114, 118, 943 P.2d 981, 983 (1997)). A district court's conclusions of law are reviewed to determine whether they are correct. *Id.* The Supreme Court must look to the testatrix's intent when reviewing a district court's interpretation of the will for accuracy. *Id.* at ¶10.

The standard of review of a district court's findings of fact is whether they are clearly erroneous. *Micklon v. Dudley*, 2007 MT 265, ¶7, 339 Mont. 373, 170 P.3d 960. “A district court's findings are clearly erroneous if the findings are not supported by substantial credible evidence, if the court has

misapprehended the effect of the evidence, or when a review of the record leaves this Court with the definite and firm conviction that a mistake has been made.” *Id.*

## **V. SUMMARY OF ARGUMENT**

There is no dispute that the testatrix’s intent is to govern the interpretation of a will. *Estate of Kuralt*, 2000 MT 359, ¶17, 303 Mont. 335, 15 P.3d 931 (“Montana courts are guided by the bedrock principle of honoring the intent of the testator”). “The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator, according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed.” *Estate of Bolinger*, 284 Mont. 114, 121, 943 P.2d 981, 985 (1997) (citing *In re Strode’s Estate*, 118 Mont. 540, 545, 167 P.2d 579, 581-82 (1946) quoting *Blacker v. Thatcher*, 145 F.2d 255, 259 (9th Cir. 1944)). Cheryl asserts that an application of these principles to the Will of Ms. Skelton, requires an equal distribution of the assets of her estate. It is Cheryl’s contention that the trial court failed to accurately interpret the

decedent's intent, and actually made findings inconsistent with its own interpretation.

During the course of the proceedings, the trial court reopened the probate of Ms. Skelton's estate in order to honor her intent that real property in California should be probated and divided equally between the two sisters, Cheryl and Carolyn Geiger. App. Ex. F, *Findings of Fact, Analysis and Order*, p. 4. The trial court correctly found that Ms. Skelton's Will contains a residuary clause that "unequivocally distributes a 'share' to Plaintiff, Cheryl Calvert." *Id.*, p. 1. The district court's definition and distribution of that "share" is clear error as it does not provide for a consistent application of Ms. Skelton's intent, instead it allows the definition of "share" to be dissected and shift, depending upon which asset of the estate is being distributed. Despite the fact that the Will, and therefore the intent of Ms. Skelton, makes no distinction between either personal or real property, nor does it make any distinction between different parcels of real property held by the estate, the trial court has ordered distribution of the assets of the estate to reflect such a distinction. The trial court committed clear error by finding that the Montana property held by the estate should be distributed differently than all the other property and assets of the estate.

The Court found that the testatrix intended to give Cheryl a “share” of the estate, but then created an inconsistent definition of that “share” to be applied to the assets of the estate, without such direction from the Will. Specifically, the trial court adopted as fact that the Will requires “an equal division of the assets”, which includes the real property located in California. App. Ex. F, *Findings of Fact, Analysis and Order*, p. 1. Despite this finding, however, the trial court found that in regard to the real property located in Montana, Cheryl is only entitled to the exclusive right to reside on the property. App. Ex. H, *Order on Motion for Enforcement*, p. 3. In making its decision, the trial court found that the “share” referred to in the Will is defined as follows, “. . . to my daughter Carolyn DeAnn Ratcliff Geiger, to disburse between Carolyn DeAnn Ratcliff Geiger and Cheryl Lynn Calvert as I have instructed Carolyn DeAnn Ratcliff Geiger to do.” Despite the fact that those instructions were never written down and that Carolyn Geiger was precluded at trial from testifying as to those instructions (on hearsay grounds), the trial court has allowed the entirety of Ms. Skelton’s intent to be determined by Carolyn Geiger’s understanding of those instructions, subject to Carolyn Geiger’s whim and personal agenda. In doing so, the trial court has disregarded the contrary intent of Ms.

Skelton, which is apparent from the four corners of the Will itself, and the circumstances in existence at the time the Will was framed.

In the alternative to an equal distribution of all the assets, Cheryl contends that the facts and case law support a finding that she is entitled to a life estate, in the Montana property, and therefore, the benefits that accompany a life estate including rent profits. Pursuant to the testimony given at trial, the trial court concluded that Cheryl has the “right to live on the property exclusively.” App. Ex. H, *Order on Motion for Enforcement*, p. 3.

Furthermore, the governing statutory scheme provides strict classifications of estates in real property. See Mont. Code Ann. §70-15-202. The fact that Cheryl has the right to reside on the property for the rest of her life would qualify as a life estate under the statute. Based upon the foregoing statute, the record and trial court’s findings, Cheryl contends that she is entitled to possession of the property for her life. This conclusion is further supported by case law, specifically this Court’s holding in *Harbeck v. Orr*, 192 Mont. 243, 627 P.2d 1217 (1981). This Court interpreted the grant language in that case to “disclose the intention to give . . . a life estate in the property.” *Id.* at 249, 627 P.2d at 1220. The grant given in that case is

equivalent to the grant given in this case, an exclusive right to live on the property for life. The intention to create a life estate is further supported by “providing as to all the details of such an estate, including the matters of repairs, replacement, taxation, utilities and other provisions.” *Id.*

In summary, the trial court committed clear error by defining Cheryl’s “share” to be anything but half of the assets of the estate. Just as Cheryl is entitled to half of the personal property of the estate and half of the proceeds of the real property located in California, she is also entitled to half of the value of the real property located in Montana. The residuary clause of the Will does not make any distinctions between Ms. Skelton’s property, and it should all be distributed the same. In the alternative, even if this Court finds that Cheryl is not entitled to half of the value of the Montana property, the trial court erred by holding that the testatrix’s intent did not provide, at a minimum, a life estate on behalf of Cheryl in the Montana property. By finding that the testatrix’s intent was to grant Cheryl an exclusive right to reside on the Montana property for the rest of her life, the trial court has established all the elements necessary for a life estate.

## VI. ARGUMENT

### A. IN ORDER TO HONOR THE TESTATRIX'S INTENT, ALL OF THE ASSETS OF THE ESTATE MUST BE DISTRIBUTED EQUALLY.

There is no dispute that the testatrix's intent controls the distribution of the assets pursuant to a will. *In the Matter of the Estate of Evans*, 217 Mont. 89, 94, 704 P.2d 35, 38 (1985). "In construing a will, substance rather than form must be regarded, and the instrument should receive the most favorable construction to accomplish the purpose intended by the testator." 80 Am.Jur.2d, *Wills* §1127 at 237. The words of the instrument are to receive an interpretation which will give some effect to every expression, rather than an interpretation that will render any of the expressions inoperative. *In re Estate of Snyder*, 2000 MT 113, ¶10, 299 Mont. 421, 2 P.3d 238. "The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator, according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed." *Estate of Bolinger*, 284 Mont. 114, 121, 943 P.2d 981, 985 (1997) (citing *In re Strode's Estate*, 118 Mont. 540, 545, 167 P.2d 579, 581-82

(1946) quoting *Blacker v. Thatcher*, 145 F.2d 255, 259 (9th Cir. 1944)).

Cheryl asserts that an application of these principles to the Will of Ms.

Skelton, requires an equal distribution of the assets of her estate.

It is Cheryl's contention that the trial court failed to assign the words of the instrument an interpretation that would give effect to every expression and therefore failed to accurately interpret the decedent's intent. In determining the intent of Ms. Skelton, it is clear from the Will, in particular paragraph I, that she did not intend to disinherit Cheryl from any of her property. App. Ex. I, *Last Will and Testament*, Paragraph I. Ms. Skelton clearly identified Cheryl as her daughter in her Will. *Id.* In fact, Ms. Skelton clearly identified three children and three stepchildren in her Will and then expressly disinherited her three stepchildren and her son, David Michael Fuentes. *Id.* Cheryl and Carolyn were the only individuals identified as children and not expressly disinherited in the Will. Therefore, in order to give effect to every expression in the Will, it follows that Paragraph I of the Will reflects the intent of Ms. Skelton to include both Cheryl and Carolyn in her dispositive wishes. This conclusion is further supported by the testimony of Corbit Harrington, the Will drafter, that

neither Cheryl nor Carolyn was to be excluded from the Will. *Trial Transcript*, p.116, l. 12-23.

Paragraph V of the Will is informative as to how the assets of the Will are to be distributed to Cheryl and Carolyn. Paragraph V defines the parameters of the assets which are to be distributed under the Will as “all the rest, residue, and remainder of my property of all kinds, real and personal, not otherwise disposed of in this will, and all lapsed and void devises and bequests, if any, and all property which for any reason may not otherwise pass under the provision of this will . . .” App. Ex. I, *Last Will and Testament*, Paragraph V. As is clear from the four corners of the Will and the testimony of James P. Murphy, the attorney who prepared all of the estate pleadings, the Will does not differentiate between real and personal property. *Trial Transcript*, p. 147, l. 13-16. Therefore, pursuant to the Will, all assets of the estate should be distributed the same way.

Furthermore, Paragraph V includes a predecease clause which provides the following:

If Carolyn DeAnn Ratcliff Geiger predeceases me, then her share shall go to her children, namely Kyle Scott Gibson and Clinton Gibson. If Cheryl Lynn Calvert predeceases me, then her share shall go to my daughter, Carolyn DeAnn Ratcliff Geiger.

App. Ex. I, *Last Will and Testament*, Paragraph V. In order to give effect to this clause, it is necessary to find that Ms. Skelton intended to provide a “share” to Cheryl capable of being disbursed independently of Carolyn’s share. If for example, Carolyn Geiger had predeceased Ms. Skelton, her share would have passed to her children, and Cheryl would have been entitled her own “share.” Just because this contingency did not occur does not mean that the clause should be nullified. The predecease clause is informative as to the intent of Ms. Skelton to provide each of her daughters an independent and exclusive “share” of her estate.

The trial court’s findings of fact do not comport with the intent of Ms. Skelton as provided in the Will. Although the trial court found that Ms. Skelton’s Will “contains a residuary clause that unequivocally distributes a ‘share’” to Cheryl, the trial court’s definition of “share” does not reflect the intent of Ms. Skelton. App. Ex. F, *Findings of Fact, Analysis and Order*, p. 1. The trial court defined the “share” to which Cheryl is entitled as “ . . . to my daughter, Carolyn DeAnn Ratcliff Geiger to disburse between Carolyn DeAnn Ratcliff Geiger and Cheryl Lynn Calvert as I have instructed Carolyn DeAnn Ratcliff Geiger to do.” *Id.* The court adopted as fact that the instructions governing the distribution of Cheryl’s share included:

- a. an equal division of assets,
- b. that Calvert could live on the real property at issue in this cause of action for as long as desired rent free, and
- c. that upkeep/maintenance/taxes/insurance for the property was to be paid by Geiger at her expense, not the estate's.

*Id.*

By defining Cheryl's "share" in such a way, the trial court has failed to give effect to all the expressions in Ms. Skelton's Will and therefore has failed to accurately interpret the Will according to her intent. As noted above, the Will makes no distinction between personal and real property. Therefore, by imposing a distinction between "assets" which are to be equally distributed and "the real property at issue in this cause of action" the trial court has created a definition of "share" that is inherently inconsistent with its own findings.

Neither is the district court's interpretation of "share" consistent with Montana law. First, "share" is defined as "an allotted portion owned by, contributed by, or due to someone." Black's Law Dictionary (8th Ed. 2004). Second, "share" also presumes "equal" under Montana law. When it comes to real estate, an interest in common is defined as:

Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common unless acquired by them in partnership for partnership purposes or unless declared in its creation to be a joint interest, as provided in 70-1-307.

Mont. Code Ann. §70-1-314. Moreover, the presumption is that Cheryl and Carolyn were equal cotenants in the Montana real property, the same as the California real property and all of the Montana personal property. **“It is presumed that shares of cotenants are equal, whether they be tenants in common or joint tenants.”** *Estate of Dern Family Trust*, 279 Mont. 138, 151, 928 P.2d 123, 131 (1997)(citing 20 Am.Jur.2d *Cotenancy and Joint Ownership* §127 (1995); *Poepping v. Monson*, 138 Mont. 38, 47, 353 P.2d 325, 330 (1960)(citing *Ivins v. Hardy*, 120 Mont. 35, 40, 179 P.2d 745, 747-48 (1947)) (emphasis added).

Taking the proper definition of “share” and applying Montana law, leads to the natural conclusion that Cheryl’s “share” was common and equal with that of Carolyn, i.e., they each were entitled to ownership of all real property as equal cotenants, not just some of the real property. To find otherwise is an inequitable and ambiguous interpretation of Ms. Skelton’s *Last Will and Testament*.

Although the trial court found that Carolyn Geiger, as the personal representative, distributed the cash assets and personal property to Cheryl pursuant to the “instructions” of the decedent, the court held that the estate was not administered pursuant to the Will and decedent’s intent. App. Ex. F, *Findings of Fact, Analysis and Order*, p. 2-4. In fact, Carolyn Geiger even distributed assets that she held as a joint tenant with rights of survivorship. *Trial Transcript*, p. 213-215. The trial court held that in order for Carolyn to distribute Cheryl’s “share” in accordance with the intent of Ms. Skelton, the real property owned by the estate and located in California “shall be sold and the proceeds after expenses divided equally between [Cheryl] Calvert and [Carolyn] Geiger. *Id.* at 4.

The trial court has essentially determined that all the assets in the estate should be distributed equally between Cheryl and Carolyn, *except* the real property located in Montana, despite the fact that the Will makes no distinction between personal property and real property or between different parcels of real property. Even though the trial court reopened the administration of the estate to require that Carolyn Geiger distribute half of the value of the real property in California to Cheryl, it has warped the definition of “share” to include only a right to occupy the real property in

Montana. It does not follow that Cheryl's "share" should be limited in such a way when the Will makes no such distinction. The trial court held that the instructions for distribution required an equal division of the assets and has ordered such distribution of all assets, except one, the real property located in Montana. It is Cheryl's assertion that in order to accurately reflect the intent of the testatrix, all assets of the estate should be divided equally, with no exceptions.

The trial court committed clear error by finding that Cheryl's "share" must include an equal division of assets, including the half of the proceeds of the sale of real property in California, yet that her "share" was limited to a right of occupancy in the real property located in Montana. The Will itself makes no such distinction. To the contrary, the language of the Will makes clear that all personal and real property are to be distributed in the same way. App. Ex. I, *Last Will and Testament*, Paragraph V. Therefore, Cheryl is entitled to one-half of the value of the real property located in Montana.

Such a result is further supported by a reading of the Will in light of the situation and circumstances that surrounded the testatrix when the instrument was framed, as is required when judicially interpreting a Will. *Estate of Bolinger*, 284 Mont. 114, 121, 943 P.2d 981, 985 (1997). Corbit

Harrington, the drafter of Ms. Skelton's Will, testified at trial that he drafted a *Quit Claim Deed* wherein Ms. Skelton would gift her interest in the real property located in Musselshell County, Montana to her daughters, Cheryl and Carolyn Geiger, as tenants in common. *Trial Transcript*, p. 110, l. 19-24. At the time that Mr. Harrington delivered the estate planning documents to Ms. Skelton, he included a letter expressing concern that any property deeded to Cheryl prior to her divorce would be included in her marital estate. *Trial Transcript*, p.112, l. 5-13.

In addition to Cheryl's pending divorce, on June 19, 1998 Cheryl was involved in a motorcycle accident that put her in a coma for two weeks, requiring extensive hospitalization and surgeries. *Trial Transcript*, p. 42-44. The accident also resulted in a head injury, prompting Cheryl to grant a power of attorney to her sister Carolyn Geiger. *Trial Transcript*, p. 45-46. The accident occurred in the same month that Ms. Skelton contacted Corbit Harrington to draft her Will. Due to the injuries sustained in the accident and the fact that Carolyn Geiger held a power of attorney for her sister, it stands to reason that Ms. Skelton intended Cheryl's "share" to be overseen by Carolyn and distributed to Cheryl when she was in better health. The circumstances of the accident at the same time the Will was drafted is

informative as to Ms. Skelton's intent. As discussed above, not only did she not intend to disinherit Cheryl, she took extra measures to make sure that Cheryl's "share" was protected until such a time that Cheryl could manage her affairs again.

Therefore, in accordance with Paragraph I of the Will, which identifies all of Ms. Skelton's children and expressly disinherits all except Cheryl and Carolyn, and the deed originally drafted by Corbit Harrington, it is clear that Ms. Skelton's testamentary intention was to deliver her real and personal property to her two daughters equally, to the exclusion of her son, David Fuentes and her three stepchildren. It is also clear from the documentation and the testimony of the parties that it was Ms. Skelton's intent that all of her assets were to be delivered to her two daughters equally once Cheryl's divorce was concluded. Thus the residuary clause of Ms. Skelton's Will indicating that Cheryl's "share" was to be "disbursed" to Cheryl, was intended to mean after Cheryl's divorce was final.

It is Cheryl's position that in order to give meaning to all of the words in the Will, and in consideration of the situation that surrounded the testatrix when the instrument was framed, the correct interpretation of Ms. Skelton's intent is to find that Cheryl's "share" of the estate is equal to that of her

sister, including an equal disbursement of the real property located in Musselshell County, Montana. To find otherwise imposes a distinction between assets that is not included within in the Will and ignores the intent of Ms. Skelton that Cheryl inherit an independent share under the Will.

**B. AT A MINIMUM, THE TESTATRIX INTENDED TO  
CREATE A LIFE ESTATE ON BEHALF OF CHERYL  
CALVERT.**

In the alternative to an equal distribution of all the assets, Cheryl contends that the facts and case law support a finding that she is entitled to a life estate in the Montana property, and therefore, the benefits that accompany a life estate, including rent profits. Pursuant to the testimony given at trial, the trial court concluded that Cheryl has the “right to live on the property exclusively.” App. Ex. H, *Order on Motion for Enforcement*, p. 3. The trial court found that the decedent’s intent was to provide Cheryl “a place to live basically, free of charge.” *Id.* The testimony given at trial by Carolyn Geiger confirms that Cheryl is entitled to live on the property every day, from now until the day she dies, even if there are gaps in her using the property as a residence. See *Trial Transcript*, p. 257, l. 3-15.

Furthermore, the governing statutory scheme provides strict classifications of estates in real property. See Mont. Code Ann. §70-15-202.

The governing statute provides the following:

Estates in real property, in respect to the duration of their enjoyment are either:

1. estates of inheritance or perpetual estates;
2. estates for life;
3. estates for years;
4. estates from year to year, quarter to quarter, month to month, week to week; or
5. estates at will.

*Id.*

In addition to a fee, these are the only classifications available.

Therefore, the fact that Cheryl has the right to reside on the property for the rest of her life, would qualify as a life estate under the statute. Based upon the foregoing statute, the record and trial court's findings, Cheryl contends that since she is entitled to possession of the property for her life, she effectively has a life estate.

Cheryl's position that she is entitled to a life estate in the Montana property is further supported by this Court's previous holding in *Harbeck v.*

*Orr*, 192 Mont. 243, 627 P.2d 1217 (1981). In *Harbeck*, this Court interpreted the language “entitled to remain in possession thereof, rent free, for the rest of her life” to “disclose the intention to give . . . a life estate in the property.” *Id.* at 249, 627 P.2d at 1220. The grant given in that case is equivalent to the grant in this case, an exclusive right to reside on the property for life. In addition, the Court in *Harbeck* held that the intention to create a life estate was evidenced by “providing as to all the details of such an estate, including the matters of repairs, replacement, taxation, utilities and other provisions.” *Id.* Those details have also been found to exist in this case. The trial court found that despite Cheryl’s right to reside on the property, “the upkeep, maintenance, taxes and insurance for the property is to be paid by Ms. Geiger at her expense, not the estate’s. App. Ex. F, *Findings of Fact, Analysis and Order*, p. 4.

The trial court committed clear error by misapprehending the evidence and the effect of the evidence in this case. A finding that Cheryl is entitled to a life estate is consistent with the findings of fact of the trial court, namely that she is entitled to exclusive residency of the property. In fact, all of the trial court’s findings of fact combined to establish all of the elements necessary to preserve a life estate. The trial court’s determination that such a

right grants anything less than a life estate is inconsistent with this Court's previous holdings and makes it apparent that a mistake has been made.

## **VII. CONCLUSION**

It is clear from the residuary clause of the *Last Will and Testament* of Ms. Skelton that she intended for Cheryl to receive an equal share of the estate with her sister, Carolyn Geiger. That the distribution should wait until after Cheryl's divorce and her health issues from her very serious accident were resolved, is also clear. There is no room for interpretation that specific assets should be treated differently under the terms of the Will. Finally, if nothing else, Cheryl clearly has a life estate in the Montana real property and that life estate should be delivered with a Personal Representative's deed to Carolyn Geiger, with a life estate in Cheryl, along with all the benefits associated therewith.

DATED this \_\_\_\_\_ day of August, 2010.

MARRA, SEXE, EVENSON & BELL, P.C.  
2 Railroad Square, Suite C  
P.O. Box 1525  
Great Falls, MT 59403-1525

By \_\_\_\_\_  
Kirk D. Evenson  
Attorneys for Appellant

## **CERTIFICATE OF MAILING**

I, the undersigned, do hereby certify that a copy of the within and foregoing BRIEF OF APPELLANT was mailed on the \_\_\_\_\_ day of August, 2010, at Great Falls, Montana, and directed to the following:

Court E. Ball  
Towe, Ball, Enright, Mackey  
& Sommerfeld, P.L.L.P.  
P.O. Box 30457  
Billings, MT 59107-0457

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Donna M. Osterman

## **CERTIFICATE OF COMPLIANCE**

I, Kirk D. Evenson, one of the attorneys for Appellants, hereby certify that:

(1) Said BRIEF OF APPELLANT, filed herewith has a line spacing of 2.0, except for footnotes and quoted, indented material, which have a line spacing of 1.0;

(2) Said BRIEF OF APPELLANT, is proportionately spaced and uses a 14 point Times New Roman typeface; and

(3) Said BRIEF OF APPELLANT, has a word count of 6,359 as counted by WordPerfect X4 for Windows, not averaging more than 280 words per page, not including the Table of Contents, Table of Authorities and Certificate of Mailing.

DATED this \_\_\_\_\_ day of August, 2010.

MARRA, SEXE, EVENSON & Bell, P.C.  
2 Railroad Square, Suite C  
P.O. Box 1525  
Great Falls, Montana 59403-1525

By \_\_\_\_\_  
Kirk D. Evenson  
Attorneys for Appellant